No. 22394

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HAWAIIAN PARADISE PARK CORPORATION, a Hawaii corporation,	
Appellant,	
vs.	
FRIENDLY BROADCASTING CO., INC., an Ohio corporation,	
Appellee.	

On Appeal from the United States District Court
for the District of Hawaii

APPELLANT'S OPENING BRIEF

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

CASES

RULES

STATUTES

TEXTS

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STATEMENT OF JURISDICTION

This was an action between citizens of different states and the matter in controversy exceeded $10,000, exclusive of interest and costs (R. 3). The United States District Court for the District of Hawaii had jurisdiction of the cause of action under 28 U.S.C.A. §1332. This Court has jurisdiction to hear this appeal by virtue of 28 U.S.C.A. §1291. Appellant has taken this appeal under Rules 73 and 75 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Pleadings:

On May 3, 1967, Friendly Broadcasting Co., Inc., an Ohio corporation, appellee herein and hereinafter referred to as "Friendly", brought suit against Hawaiian Paradise Park Corp., a Hawaii corporation, appellant herein and

hereinafter referred to as "Hawaiian". Friendly sought (1) to enjoin Hawaiian from withdrawing, terminating or in any manner whatsoever, interfering with Friendly's application to transfer Hawaiian's Federal Communications Commission (hereinafter referred to as "FCC") license to operate television station KTRG-TV (Channel 13) in Honolulu, Hawaii, or (2) without the recognition of Friendly's alleged prior rights, from selling, attempting to sell or negotiating for sale any and all of the property described in an agreement dated January 7, 1966 (Ex. P-1) until the time specified in a letter dated December 16, 1966 (Ex. P-6) had expired (R. 7). The agreement dated January 7, 1966 is hereinafter referred to as the "basic agreement". The letter dated December 16, 1966 is hereinafter referred to as the "December 16 letter".

Friendly amended its complaint to allege that Hawaiian's license to operate the television station, together with the other property to be transferred under the basic agreement, constituted a unique chattel and prayed that Hawaiian be ordered to specifically perform the basic agreement, as amended by the December 16 letter (R. 61-62).

Hawaiian answered and essentially alleged that Hawaiian had terminated the basic agreement in the manner permitted by that agreement by its letter of April 17, 1967 (Ex. P-10); that its Washington attorney, A. Harry Becker, had no authority to extend the termination date of the basic agreement; that it was ready and anxious to complete a sale of the television station to another purchaser at a greater price; and, that the

basic agreement as amended by the December 16 letter was not subject to specific performance (R. 64-68). Hawaiian also counterclaimed essentially alleging that it was suffering operating losses of approximately $700 per day and that Freindly's action taken subsequent to Hawaiian's termination of April 17, 1967, was causing Hawaiian to suffer these losses (R. 68-70).

Upon Hawaiian's motion (R. 53-59) and agreement of the parties, the Court, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, advanced the trial of the action on its merits and consolidated the same with the hearing on Friendly's application for a preliminary injunction (R. 71-72).

By stipulation, it was agreed that trial of the issues raised by the counterclaim would be postponed (Tr. 2-3).

Facts:

On or about January 7, 1966, Hawaiian entered into the basic agreement with United Broadcasting Company, Inc., to sell and assign said FCC license, together with all the fixed and tangible assets of Hawaiian used or useful in the operation of station KTRG-TV. The basic agreement was subsequently assigned by United to Friendly with the knowledge and consent of Hawaiian (Ex. P-2g).

The basic agreement was prepared for the signatures of the parties and was signed in Honolulu on behalf of Hawaiian by its president, David Watumull. After the basic agreement was signed by Mr. Watumull, it was returned to

A. Harry Becker, Hawaiian's counsel in Washington, D. C., upon the express condition that the closing date (the date upon which the sale and assignment would be consummated and control of the station turned over to Friendly) would be changed from 45 days to 5 days after FCC approval of the sale and assignment (Ex. D-1) (Tr. 267-268).

On or about January 11, 1966, Mr. Becker and Stanley B. Cohen, a partner of the Washington, D. C. law firm of Cohn & Marks, counsel for United Broadcasting Company, Inc., agreed upon the change in the closing date specified by Mr. Watumull, and their agreement was set forth in a letter dated January 11, 1966, from Mr. Cohen to Mr. Becker (Ex. P-2f). This letter was signed only by Mr. Cohen as the attorney of United Broadcasting Company, Inc. The last paragraph of the letter asserted the following, however: "You [Mr. Becker] have also advised me that the substance of the foregoing provisions has been conveyed to seller and that seller is agreeable thereto." Morever, the letter was affixed as an exhibit to the seller's portion of the Application for Consent to the Assignment of the License (Ex. P-2a) at the time that the Application was signed by Mr. Watumull as president of Hawaiian (Tr. 269).

The Application for consent to transfer the license was filed with the FCC on February 3, 1966 (Admission No. 7, Hawaiian's Answer, R-65).

Pursuant to the basic agreement (Ex. P-1, p. 4), an escrow account in the amount of $25,000 was required to be established with the attorneys of the parties as joint escrow

agents. The depository bank was in Washington, D. C. and instructions concerning the disbursement of the account were contained both in the basic agreement and the letter of January 11, 1966 (Ex. P-2f). Only the details of choosing the depository and establishing the account were left to the attorneys Mr. Becker and Mr. Cohen, since the other terms of the escrow were already established in the two documents mentioned above.

Shortly prior to June 7, 1966, at the request of Mr. Watumull, Mr. Becker commenced negotiations to have Friendly put an additional sum into an escrow account at the Bank of Hawaii, Honolulu, Hawaii (Tr. 203). Mr. Becker initiated conversations regarding the escrow account with Friendly's attorneys (Tr. 204) and by letter dated June 7, 1966, to Mr. Cohen (Ex. P-3) confirmed recent telephone conversations in which an agreement had been reached as to the establishment of the escrow account. By letter dated June 8, 1966 (Ex. P-4), Mr. Cohen wrote to Mr. Becker and transmitted Friendly's check for $185,000. That letter (Ex. P-4) was not filed with the FCC (Tr. 112-113).

By letter dated June 9, 1966, Mr. Becker wrote to the Bank of Hawaii requesting the establishment of the escrow account (Ex. P-12a). A copy of the letter was simultaneously submitted to Mr. Watumull (Tr. 315).

Some time after June 22, 1966, Mr. Paul Dobin replaced Mr. Cohen and other memebers of his law firm as the attorney in charge of Friendly's portion of the Application pending

before the FCC. Prior thereto Mr. Dobin had not been personally involved in the negotiation of the January 11, 1966 letter (Ex. P-2f) or the June correspondence (Ex. P-3 and Ex. P-4) (Tr. 106-108).

When the Application was filed with the FCC on February 3, 1966, the parties contemplated that the sale would be consummated within about 90 to 120 days (Tr. 270). Friendly and its counsel were well aware that Hawaiian was very anxious to consummate the sale, and they knew that such anxiety was prompted by the fact that Hawaiian was suffering substantial operating losses of approximately $700 per day (Tr. 23; 31; 59; 110-111; 308). Notwithstanding Hawaiian's desire for prompt action, it became apparent that Friendly was having difficulty in satisfying the FCC's requirements, and from as early as March, 1966, Friendly was filing additional information in an attempt to satisfy these requirements (Tr. 53; 144-145). The additional information did not, however, satisfy the FCC and on September 30, 1966, the FCC ordered that the Application be designated for hearing (Ex. P-13). This meant that the FCC was unable to make a finding that it was in the public interest to assign the license and, as required by FCC rules, a hearing had to be held before the Application could be denied (Tr. 54). It also meant that the processing of the Application would be substantially delayed.

The delays caused in processing the Application were Friendly's fault, and the matters raised by the order

designating the Application for hearing (Ex. P-13) were all directed to Friendly (Tr. 119; 147).

On October 28, 1966 there was a pre-hearing conference, at which time Mr. Dobin became convinced that a decision on the Application was not possible before February 3, 1967 (Tr. 67), the first anniversary of the filing date of the Application and the earliest date upon which either party could give notice of termination of the basic agreement. Accordingly, Mr. Dobin, being concerned that there was inadequate time under the basic agreement to receive an initial decision by the examiner, began discussions with Mr. Becker concerning an agreement to extend the time period during which Hawaiian would stay in the case (Tr. 68-70). Nothing specific was discussed until a meeting held sometime in the latter part of November, 1966 between Mr. Dobin, Mr. Becker and Mr. Eaton, the president of Friendly (Tr. 70-72; 214). Certain terms and proposals discussed at such meeting were shortly thereafter reduced to writing by Mr. Dobin in a document entitled "Supplement to Agreement" (Ex. D-2), which was signed by Mr. Eaton and sent to Mr. Becker (Tr. 76).

Under letter dated December 2, 1966 (Ex. D-3), the Supplement was sent by Mr. Becker to Mr. Watumull for execution by him as president of Hawaiian (Tr. 213). The essential terms of the Supplement were that the basic agreement, terminable by either party after February 3, 1967, would not be terminable until December 31, 1967, if a final decision by the FCC on the Application had not been made

before said date. In addition, if the FCC approved the assignment and the sale were consummated, Friendly would indemnify Hawaiian for all net out-of-pocket losses up to $35,000 in the operation of the television station from September 28, 1966, until the grant of the Application. The $35,000 was to be paid upon execution of the Supplement by way of loan secured by a chattel mortgage.

Mr. Watumull rejected the Supplement and informed Mr. Becker of the rejection in a telephone conversation on December 7, 1966 (Tr. 283-284. See also notes on Ex. D-3). Mr. Becker promptly conveyed Mr. Watumull's rejection to Mr. Dobin (Tr. 77-78; 216).

During the period December 7 to 12, 1966 there were three conversations between Mr. Becker and Mr. Watumull and several between Mr. Becker and Mr. Dobin. Much testimony was adduced at the trial relating to such conversations and, inasmuch as much of that testimony goes to the basic issues of this appeal, it will be referred to in more detail in the Argument in this brief. It is, however, undisputed that the hearings before the FCC examiner commenced December 8, 1966 and continued on December 9, 12, 13 and 14, 1966 and January 9 and 13, 1967 (Tr. 87).

On December 16, 1966, Mr. Dobin wrote Mr. Becker the letter (Ex. P-6), which purported to extend the basic agreement for an indefinite time. That letter is the heart of Friendly's case. Mr. Becker admitted that he

signed the letter as counsel for Hawaiian immediately upon its receipt by him and that he immediately returned it to Mr. Dobin's office (Tr. 233). Mr. Dobin filed the letter with the FCC as part of the Application (Ex. P-8; Tr. 109). Mr. Dobin did not send a copy of the letter to Hawaiian (Tr. 110) even though the basic agreement (Ex. P-1, page 20; R. 31) required that all notices be sent to Mr. Becker and Mr. Watumull. Nor did Mr. Becker inform Mr. Watumull of the existence of the letter or of there being a written agreement extending the time of termination of the basic agreement (Tr. 243-244). Mr. Watumull first learned of the December 16 letter when Mr. Dobin enclosed a copy of it with his letter of April 19, 1967 (Ex. D-9) written in response to Hawaiian's termination letter of April 17, 1967 (Ex. P-10; Tr. 296).

Mr. Dobin admitted that he never inquired of Mr. Becker as to whether he had authority to make the agreement set forth in the December 16 agreement and Mr. Becker never told him that he had such authority (Tr. 103-105). In Mr. Becker's words: "To put it completely, the authority was never discussed." (Tr. 237).

On February 9, 1967, Mr. Watumull wrote Mr. Becker asking whether Hawaiian had the right to cancel the agreement with Friendly on five days' notice (Ex. D-4). By letter dated February 13, 1967, Mr. Becker gave his opinion that Hawaiian could give such notice of termination (Ex. D-5; D-6). The opinion letter made no mention of any agreement which extended or purported to extend the termination date of the basic agreement.

Subsequent to the receipt of said opinion letter, Mr. Watumull had several conversations with Mr. Becker in which termination of the basic agreement was discussed and each time Mr. Becker advised Mr. Watumull not to terminate until a new buyer had been obtained (Tr. 290-291).

Discussions with other possible buyers for the television station were carried on during February, March and April, with the knowledge and assistance of Mr. Becker (Tr. 290-293).

On April 17, 1967, Mr. Watumull discussed with Mr. Becker the letter of termination (Ex. P-10) that was sent on the same day to Friendly. Mr. Becker approved the letter and recommended the inclusion of an additional paragraph (Tr. 293-294). Mr. Becker confirmed this, but adds that he also suggested the return of the $5,000 he had received from Friendly (Tr. 236-237). On December 12, 1966, Mr. Dobin had transmitted to Mr. Becker Friendly's check payable to Mr. Becker in the sum of $2,500 (Ex. D-7; Tr. 81). On December 29, 1966, Mr. Dobin transmitted to Mr. Becker a second similar check (Ex. D-7; Tr. 88). At that time Mr. Watumull did not know that Mr. Becker had received payment (Tr. 302), and bills sent to Hawaiian by Mr. Becker's firm during the period January 3, 1967, to May 1, 1967, (Exs. D-8a through 8f) did not disclose the receipt by Mr. Becker of the $5,000. There was no explanation given as to why Friendly made payment directly to Mr. Becker when, according to Mr. Dobin, payment was supposed to be reimbursement to Hawaiian (Tr. 115-116).

The suit by Friendly against Hawaiian was filed on May 3, 1967. On June 30, 1967, a Judgment was entered enjoining Hawaiian from terminating the basic agreement or in any manner whatsoever interfering with the Application and provided that the Judgment and Order would remain in full force and effect until the initial decision of the FCC examiner (R.127). The Judgment was in substance a preliminary injunction and by its terms required that further action would be taken. Notice of Appeal from that Judgment was filed (R. 130), but it was dismissed by agreement of the parties (R. 142).

The initial decision of the FCC examiner was rendered on July 27, 1967. It consented to the transfer of the license to Friendly (Tr. 403-404). The decision of the FCC to consent to the transfer of the license became final on September 15, 1967 (Tr. 406-407).

On September 15, 1967, and at the earliest opportunity after the FCC decision became final, Hawaiian's counsel filed in open court a copy of a registered air mail letter dated September 15, 1967, which Hawaiian had signed and mailed to Friendly and others, and which gave notice of termination of the basic agreement as amended by the December 16 letter (R.150; Tr. 408). Hawaiian asserted that it did not agree with the Court's decision that it was bound by the December 16 letter, but inasmuch as the Court had so ruled, Hawaiian gave notice of termination as permitted by the clear terms of the December 16 letter. Hawaiian also orally moved the Court

for an order vacating the injunction and dismissing the action (Tr. 408). The oral motion was renewed in writing (R. 144-151). The Court denied the motion (Tr. 448-449).

On September 19, 1967, Final Judgment was entered essentially ordering Hawaiian to specificially perform the basic agreement, as previously amended, including the amendment of the December 16 letter, and ordered Hawaiian to do all acts necessary and proper to facilitate and consummate the sale, subject to the condition that Friendly reimburse Hawaiian for certain operating losses (R. 152-156). This Appeal was taken from that Final Judgment on October 19, 1967 (R. 174).

SPECIFICATION OF ERRORS

The United States District Court for the District of Hawaii committed manifest errors when it made the following Findings of Fact and Conclusions of Law:

1. The Court erred in holding that, at the time Mr. Becker signed the letter of December 16, 1966 (Ex. P-6), he had express authority from Hawaiian to do so; that he had good reason to believe that he had authority to do so on behalf of Hawaiian; and that Hawaiian was agreeable to the kind of agreement he was signing (R. 120-121, Finding of Fact No. 39).

2. The Court erred in holding that the letter of December 16, 1966, was an amendment to the basic agreement (Ex. P-1) and was binding on Hawaiian (R. 121, Finding of Fact No. 40).

3. The Court erred in holding that Mr. Dobin had a right to believe that most of Mr. Becker's instructions came by telephone from Mr. Watumull and were, accordingly, acted upon by Mr. Becker, and that Mr. Dobin had a right to rely on what Mr. Becker told him based on his (Mr. Becker's) numerous telephone conferences with Mr. Watumull (R. 121, Finding of Fact No. 42).

4. The Court erred in holding that under the totality of all the circumstances, Mr. Dobin had the right to believe that Mr. Becker had the authority to sign the letter of December 16, 1966 and that said agreement bound Hawaiian (R. 121-122, Finding of Fact No. 43).

5. The Court erred in holding that Mr. Becker did thoroughly discuss with Mr. Watumull the agreement set forth in the letter of December 16, 1966; that he did tell Mr. Watumull that there was an agreement that bound Hawaiian to stay in the FCC proceedings until a decision; and that Mr. Becker believed, and had reason to believe, that Mr. Watumull understood that Hawaiian was bound to stay in the FCC proceedings until a decision and what was meant by staying in the proceedings until a decision (R. 122, Finding of Fact No. 45).

6. The Court erred in holding that Friendly did go forward with the prosecution of the Application and the FCC hearings in reliance on Hawaiian's agreement to extend the termination date of the basic agreement beyond February 3, 1967 (R. 123, Finding of Fact No. 49).

Specification of error as to Finding of Fact No. 46 was inadvertently omitted from its proper sequence.

5 (A) The Court erred in holding that Mr. Becker told Mr. Watumull that Hawaiian was bound to stay in the FCC proceedings until the Hearing Examiner's decision unless Hawaiian successfully repudiated Mr. Becker's authority to enter the December 16, 1966 agreement (R. 122, Finding of Fact No. 46).

5 (B) The Court erred in holding that because Mr. Watumull made no attempts to repudiate Mr. Becker's authority before April 17, 1967, he (Mr. Watumull) and Mr. Becker thus agreed not to do anything until a new prospective buyer could be found (R. 122, Finding of Fact No. 46).

7. The Court erred in holding that the FCC certificate, license or permit to operate station KTRG-TV is a unique chattel or asset and that the other assets or chattels or property which Hawaiian contracted to sell to Friendly were flavored or tainted by the FCC operating permit (R. 123-124, Finding of Fact No. 51).

8. The Court erred in holding that the FCC license or permit to operate station KTRG-TV held by Hawaiian was a unique chattel and a contract to sell or assign said license or permit was subject to specific performance (R. 124, Conclusion of Law No. 5).

9. The Court erred in holding that the Agreement of January 7, 1966, was amended by the letter dated December 16, 1966 (R. 124, Conclusion of Law No. 6).

10. The Court erred in holding that notwithstanding the provisions of 47 CFR, Sec. 1.513, it was immaterial that none of said amendments was signed by an officer or director of each of the corporate parties thereto, and it was sufficient to bind said parties legally that said amendments were signed by the respective parties' attorneys (R. 124, Conclusion of Law No. 7).

11. The Court erred in holding that all of said amendments were signed by the parties' attorneys with the authority of their respective clients (R. 125, Conclusion of Law No. 9).

12. The Court erred in holding that each of said amendments was and is binding upon Friendly and Hawaiian (R. 125, Conclusion of Law No. 10).

13. The Court erred in holding that A. Harry Becker had express authority to sign the December 16, 1966 amendment on behalf of Hawaiian (R. 125, Conclusion of Law No. 11).

14. The Court erred in holding that insofar as Friendly and its counsel, Mr. Dobin, are concerned, Mr. Becker had the apparent authority to sign the letter of December 16, 1966, on behalf of Hawaiian (R. 125, Conclusion of Law No. 12).

15. The Court erred in holding that Friendly would suffer irreparable injury if Hawaiian was not enjoined from withdrawing, terminating or in any manner whatsoever interfering with said Application until an initial decision by the FCC Hearing Examiner (R. 125, Conclusion of Law No. 13).

16. The Court erred in holding that Friendly would suffer irreparable injury if Defendant was not enjoined from selling, attempting to sell, or negotiating for sale, without recognition of Friendly's prior rights, any or all of the property Defendant had contracted to sell and assign to Friendly (R. 125, Conclusion of Law No. 14).

17. The Court erred in holding that if Mr. Becker did any wrong, or if he failed to communicate properly with Hawaiian and one of two parties must suffer because of his acts or omissions, then Hawaiian, the party that gave him the means in which to act or omit to act, must bear the consequences of his wrongful or improper acts or omissions (R. 126, Conclusion of Law No. 16).

18. The Court erred in holding that the basic agreement as amended (Exs. P-2f, P-4 and P-6) was subject to specific

performance, at least to the point of filing of the FCC Hearing Examiner's decision (R. 126, Conclusion of Law No. 17).

19. The Court erred in holding that Friendly had proved all the material allegations of its Complaint, as amended, and was entitled to the relief granted, at least up to the point of the filing the FCC examiner's decision (R. 126, Conclusion of Law No. 18).

20. The Court erred in failing to hold that the basic agreement was terminated by Hawaiian's letter of April 17, 1967 (Ex. P-10).

21. The Court erred in failing to hold that the December 16 letter was terminated by Hawaiian's letter of September 15, 1967, and in denying Hawaiian's Motion for Order Vacating Injunction and Dismissing Action (R. 144-151; Tr. 448-449).

22. The Court erred in dismissing Hawaiian's counterclaim (R. 156, Paragraph 3 of Final Judgment).

QUESTIONS PRESENTED

1. Was there sufficient evidence for the District Court to hold that A. Harry Becker, Washington attorney for Hawaiian, had express authority to extend the date of termination of the basic agreement?

2. Was there sufficient evidence for the District Court to hold that A. Harry Becker had apparent authority to extend the date of termination of the basic agreement?

3. Did the District Court, after having held that the December 16 letter was binding on the parties, have the power

to ignore the plain and unambiguous language of that letter and to order specific performance of the agreement after it had been terminated by Hawaiian at the time expressly permitted by the December 16 letter?

4. Did Friendly sustain its burden and prove that it was entitled to the relief of specific performance of the basic agreement, as amended?

SUMMARY OF ARGUMENT

Hawaiian's Washington attorney, A. Harry Becker, had neither express nor apparent authority to enter into or bind Hawaiian by the agreement set forth in the December 16 letter, which purported to extend indefinitely the termination date of the basic agreement.

In the alternative, if it is held that the December 16 letter is binding upon the parties as an amendment to the basic agreement, then the agreement was terminated according to the clear and unambiguous terms of the December 16 letter by Hawaiian's letter of September 15, 1967.

In either case, the Judgment should be reversed and an order entered that the basic agreement was terminated by Hawaiian on April 17, 1967, or in the alternative, on September 15, 1967, and Hawaiian should be permitted to prove its counterclaim.

Lastly, if neither termination was effective, Friendly nevertheless did not prove that it was entitled to the equitable relief of specific performance and it should have been relegated to its remedy of damages at law.

ARGUMENT

I. THE EVIDENCE FAILS TO SUPPORT THE HOLDING THAT A. HARRY BECKER, WASHINGTON, D.C. ATTORNEY FOR HAWAIIAN, HAD EXPRESS AUTHORITY TO ENTER INTO THE AGREEMENT EMBODIED IN THE DECEMBER 16, 1966 LETTER.

The contention throughout the proceedings below and in this appeal has been and is that the principal in this case, Hawaiian, through its president-manager, Mr. Watumull (Tr. 350), did not authorize its Washington, D. C. attorney Mr. Becker to enter into and to sign the agreement embodied in the December 16 letter. By express authority is meant the power of an agent to affect the legal relations of his principal by acts done in accordance with the principal's express manifestations of consent to him. Restatement, Agency 2d,"Authority", §7.

The sequence of events leading up to and surrounding the proposal and rejection of the Supplement to Agreement (Ex. D-2) is set forth above in the Statement of the Case (p. 7). The Supplement had been prepared for the signature of an authorized representative of Hawaiian, presumably Mr. Watumull (Tr. 132), in accordance to prescribed FCC form (Title 47, Code of Federal Regulations, §1.513; see Appendix A). Evidently, Mr. Dobin and Mr. Becker knew that such an amendment to the basic agree- had to be signed in compliance with FCC rules by an authorized representative of Hawaiian and, of course, Mr. Becker was not such an authorized person. The Supplement was, however, rejected, and Mr. Watumull conveyed his rejection to Mr. Becker by telephone on December 7, 1967 (Tr. 280-281; see also notes on Ex. D-3).

Sometime between December 7 and December 16 Mr. Becker nevertheless agreed with Mr. Dobin to extend the termination date of the basic agreement. On December 16 Mr. Becker signed (Tr. 233), as counsel for Hawaiian, the December 16 letter which extended the termination date on terms substantially different from those proposed in the rejected Supplement. This letter was not read to Mr. Watumull, or sent to Hawaiian for signature or approval before Mr. Becker signed it, nor was a copy forwarded to Hawaiian after its execution (Tr. 233-234). Between December 7 and December 16 Mr. Becker and Mr. Watumull had three telephone conversations, two on December 7 and one on December 12 (Tr. 284, 331). The question is, therefore, whether between the rejection of the Supplement on December 7 and Mr. Becker's signing of the letter on December 16, Mr. Watumull gave Mr. Becker express authority to enter into and to sign the agreement embodied in the December 16 letter.

Mr. Becker never unequivocally stated that he was given express authority to bind Hawaiian to the terms of the December 16 letter. Indeed, he even admitted that he did not tell Mr. Watumull about all of the terms found in the letter. Mr. Becker testified that he did not, between December 7 and December 12, the date on which he made his verbal agreement with Mr. Dobin, tell Mr. Watumull what was agreed to in the December 16 letter, i.e., that Friendly would be satisfied if Hawaiian would not terminate the basic agreement until an initial decison and that, if the decison was favorable, Hawaiian would stay through the final commission action,

but if the decision was unfavorable, then Hawaiian could terminate immediately (Tr. 225-226). Mr. Watumull's testimony on this point is not inconsistent with Mr. Becker's. Mr. Watumull also testified that Mr. Becker never informed him that Hawaiian would be bound not to terminate until a final decision if the initial decision were favorable (Tr. 282-286). The December 16 letter provided, however, that not only was Hawaiian to be bound until an initial decison, but also until a final decision if the initial one was favorable.

Mr. Becker testified that at some time between December 7 and 12 he informed Mr. Watumull by telephone that Friendly wanted Hawaiian to stay through the hearing and that Friendly would pay Hawaiian's costs in the hearing (Tr. 227). According to Mr. Becker, Mr. Watumull's reply was to the effect that if Friendly was willing to pay for the hearing to go ahead (Tr. 227). This was no more than Mr. Watumull had agreed to do even prior to December, for back in October and November, 1966, after telephone conversations with Mr. Becker, Mr. Watumull had acknowledged that under the requirements of the basic agreement (R. 27) he had no choice but to cooperate with Friendly's desire to have a hearing before the FCC and at that time Mr. Watumull was informed that Friendly would pay Mr. Becker's legal fee for the hearing (Tr. 277-278). Mr. Watumull understood the hearing to be the proceedings to be held in Washington in December, and at no time did Mr. Watumull believe Hawaiian was to be bound after February 3, 1967 (Tr. 333-334). On the other hand, Mr. Becker explained that by "stay through the hearing" he meant the taking of testimony, the filing of the

proposed findings and reply findings, and the initial decision of the examiner (Tr. 217). Mr. Becker clearly admitted, however, that he did not explain to Mr. Watumull what "stay through the hearing" meant in any of their conversations between December 7 and December 16 (Tr. 227).

Mr. Becker made a verbal agreement with Mr. Dobin on December 12, 1966 (Tr. 217, 232, 254), but only to the effect that Hawaiian would be bound up to an initial decision (Tr. 217), not through a final decision (Tr. 218). Mr. Dobin drafted the December 16 letter (Tr. 80), and though the letter contained terms which bound Hawaiian even beyond an initial decision, which terms Mr. Becker admitted he had not discussed with Mr. Watumull (Tr. 225-226), upon receipt of Mr. Dobin's letter Mr. Becker signed the letter as counsel for Hawaiian and sent it back immediately to Mr. Dobin (Tr. 233). In order for an attorney to bind his client and to sign a written agreement on behalf of his client, he must be given express authority from his client. This is especially true where an attorney is compromising or settling a claim but the same rule applies even if no litigation is involved. 7 Am. Jur. 2d, Attorneys at Law, §126, p. 127; Salter v. Carter, 257 Ala. 216, 58 So. 2d 454; Birmingham Electric Co. v. Cochran, 242 Ala. 673, 8 So. 2d 171; National Bread Co. v. Bird, 226 Ala. 40, 145 So. 462. Some of the cases even call for "special authority". Birmingham Electric Co. v. Cochran, supra; Starling, Executor v. West Erie Avenue Building and Loan Association, 333 Pa. 124, 3 A 2d 387; see also 30 A.L.R. 2d 944, Part IV, Sec. 9, "Special Authority to Compromise".

In Northwest Poultry and Dairy Products Co. v. A. C. Fry Co., 27 Wash. 2d 35, 176 P. 2d 324, the

following instructions, with regard to the sale of a building: "Go ahead, make the deal." The attorney signed on behalf of his clients a contract to sell the building but did not send copies of the contract to his clients who in the meantime accepted another offer for the building. The court held that the clients' instructions did not authorize the attorney to enter into and sign a binding contract on behalf of the clients, and the contract would not be specifically enforced in the absence of a showing of ratification. The same result was reached in Carstens v. McReary, 1 Wash. 359, 25 P. 471. Similarly in this case, even if Mr. Watumull did tell Mr. Becker to go ahead with the hearing, this did not authorize Mr. Becker to sign the December 16 letter with its broad terms. Mr. Becker could not even have reasonably believed that he was authorized to sign the December 16 letter. He himself admitted that he had no such express authority:

> "Q Did you ever ask Mr. Watumull or any other officer of Hawaiian Paradise Park Corporation for authority to sign the December 16 letter?
>
> "A [Mr. Becker] No."

The testimony of Mr. Dobin, a witness for Friendly, does not aid in establishing that Mr. Becker had express authority to bind Hawaiian to the agreement set forth in the December 16 letter. On the contrary, it corroborates a conclusion that no express authority could possibly have been given to Mr. Becker.

Mr. Dobin testified that Mr. Becker notified him of Mr. Watumull's rejection of the Supplement in a telephone

conversation (Tr. 77). During the same conversation, Mr. Dobin said that he suggested new terms of extension and that Mr. Becker agreed to the extension terms which were subsequently set forth in the December 16 letter (Tr. 78-80). The exact date of this conversation, however, could not be pinpointed by Mr. Dobin except that it was most likely sometime between December 5-8, (Tr. 81-82) but, in any case, before December 12 (Tr. 81). Mr. Dobin's testimony is inconsistent with that of Mr. Becker, who repeatedly testified that he reached a verbal agreement with Mr. Dobin on December 12, 1966. Mr. Dobin further testified that he had had no discussions with Mr. Becker pertaining to whether Mr. Becker had authority to make the agreement contained in the December 16 letter and to sign the same (Tr. 104-105) and Mr. Becker confirmed this (Tr. 237).

Accepting Mr. Dobin's testimony as fact leads to the conclusion that Mr. Becker made the extension agreement without express authority since it was made in the same conversation in which Mr. Becker conveyed Mr. Watumull's rejection of the Supplement. Since Mr. Becker himself testified that he never fully explained to Mr. Watumull the terms upon which Hawaiian would stay in the hearing (Tr. 225-226), Mr. Becker could not possibly have had express authority to convey Mr. Watumull's rejection of the sale and to accept immediately a new extension proposal which would bind Hawaiian until an initial decision and beyond.

If all of the uncontradicted evidence relating to the conversations between Mr. Becker and Mr. Watumull and Mr. Becker and Mr. Dobin during the period December 7 through December 16 are considered in the light most favorable to Friendly, a finding that Mr. Becker had express authority to enter into and sign the agreement embodied in the December 16 letter would be clearly erroneous. The evidence shows that Mr. Becker did not have express authority to sign the letter and did not have express authority to agree to the terms of the letter and to make it a binding agreement.

Further evidence from which it may be inferred that Mr. Becker did not have express authority is discussed below.

Mr. Watumull was not informed of the December 16 letter until Hawaiian attempted to terminate the basic agreement on April 17, 1967 (Ex. P-10; Tr. 294) and, along with his reply thereto, (Ex. D-9) Mr. Dobin transmitted to Mr. Watumull a copy of the December 16 letter. Nor did Mr. Watumull know that on December 12, 1966, even before the December 16 letter had been signed, a check was drawn by Friendly payable to Mr. Becker in the amount of $2,500 (Ex. D-7); and that Mr. Becker subsequently received another $2,500 by check dated December 29, 1966 (Ex. D-7). Hawaiian was thus never in a position to repudiate the December 16 letter since it had no knowledge of it: Mr. Becker never sent a copy of the December 16 letter to Mr. Watumull (Tr. 234); he never read it to Mr. Watumull on the telephone (Tr. 234), and he did not recall ever telling Mr. Watumull of its existence (Tr. 235,

253-254). Even when, by letter dated February 9, 1967 (Ex. D-4), Mr. Watumull wrote to Mr. Becker on behalf of the Board of Directors of Hawaiian to request a written opinion as to whether Hawaiian then had the right to cancel its contract with Friendly and, by opinion letter dated February 13, 1967 (Ex. D-5), Mr. Becker replied, no reference to the December 16 letter was made:

> "Mr. Watumull, your president, has asked that I give you my opinion as to whether or not Hawaiian Paradise Park Corporation has a right to give notice of cancellation of its contract with Friendly Broadcasting Company, under which it was proposed that Friendly Broadcasting Company acquire by assignment the license and assets of Television Station KTRG-TV.
>
> "In my opinion, since February 3 and at anytime prior to the day the Commission grants the application Hawaiian Paradise Park Corporation may give notice of termination of the agreement between it and Friendly Broadcasting Company pursuant to the provisions of Paragraph 11 of the agreement."

Mr. Becker also testified that he did not in the phone conversations prior to Mr. Watumull's February 9 request for opinion recall informing Mr. Watumull that he had signed a written agreement extending the termination date (Tr. 252, 253). Under examination by the Court, Mr. Becker failed to give satisfactory explanations as to why he failed to inform Mr. Watumull of the December 16 letter (Tr. 253).

Mr. Becker stated that he told Mr. Watumull that Hawaiian was bound to stay in until an initial decision of the examiner and if Hawaiian wanted to disavow Mr. Becker's agreement, Hawaiian could then terminate after February 3 (Tr. 253), but

Mr. Becker himself felt that the agreement was not beyond his authority (Tr. 259). Mr. Becker then proceeded to aid Hawaiian in finding a new buyer for the television station (Tr. 290-293).

On April 17, 1967, Mr. Watumull read and discussed on the telephone with Mr. Becker a draft of a termination letter that Mr. Watumull intended to send to Friendly. Mr. Becker suggested the addition of a paragraph concerning the release of escrow funds and gave the names of those to whom the letter should be sent (Tr. 294). The letter (Ex. P-10) was mailed on the same day (Tr. 294).

Soon thereafter, Mr. Watumull received a reply from Mr. Dobin, dated April 19, 1967 (Ex. D-9), with a copy of the December 16 letter (Tr. 294-295). Mr. Watumull phoned Mr. Becker and informed him that he (Mr. Watumull) had never seen the letter and had not known anything about it (Tr. 296). Mr. Becker responded by telling Mr. Watumull not to worry about the letter and that he would get the application withdrawn from the Commission and would go ahead and proceed with working on the contract with Hazel Bishop (Tr. 296-297). How could Mr. Becker have advised Hawaiian, helped it to seek new buyers, and aided Mr. Watumull in the drafting of a termination notice when he knew that a notice of termination by Hawaiian would surely lead to litigation (Tr. 258) and also knew that he had signed a written agreement about which his client was not informed and which he believed to be valid? In other words, Mr. Becker advised his client that it could terminate its contract if it was willing to run the substantial risk

of a lawsuit in which he would be maintaining a position diametrically opposed to his own client!

Upon a consideration of the evidence during the crucial period between December 7 and 16 and the events transpiring subsequent thereto, it was clearly erroneous for the Court to conclude that Mr. Becker had express authority to enter into and sign the agreement embodied in the December 16 letter.

II. THE EVIDENCE FAILS TO SUPPORT THE HOLDING THAT A. HARRY BECKER HAD APPARENT AUTHORITY TO ENTER INTO THE AGREEMENT EMBODIED IN THE DECEMBER 16 LETTER.

Apparent authority arises only from the principal's manifestations to third parties and exists only if it is reasonable for the third person to believe that the agent has authority. Restatement, Agency 2d, §27

A good statement of the general rule of law is found in Quint v. O'Connell, 89 Conn. 353, 94 A. 288, 290:

> "Apparent and ostensible authority is such authority as a principal intentionally or by want of ordinary care causes or allows a third person to believe that the agent possesses. This authority to act as agent may be conferred if the principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to act on an apparent agency. It is essential to the application of the above general rule that two important facts be clearly established: (1) That the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority; and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe, and did believe, that the agent possessed

> the necessary authority. The apparent power of an agent is to be determined by the acts of the principal, and not by the acts of the agent; a principal is responsible for the acts of an agent within his apparent authority only where the principal by his acts or conduct has clothed the agent with the appearance of authority, and not where the agent's own conduct and statements have created the apparent authority. The liability of the principal is determined in any particular case, however, not merely by what was the apparent authority of the agent but by what authority the third person, exercising reasonable care and prudence, was justified in believing that the principal had by his acts under the circumstances conferred upon his agent."

Measured by the criteria established by the foregoing general rule, the evidence does not support a holding that Mr. Becker had apparent authority to enter into the agreement to indefinitely extend the date of termination of the existing basic agreement.

There were no acts of the principal directly with Mr. Dobin. It is clearly established that Mr. Dobin never talked, corresponded or in any manner dealt with Mr. Watumull or any other officer, director or employee of Hawaiian, and that his dealings were exclusively with Mr. Becker (Tr. 102-103).

Mr. Dobin, under the guise of testimony, stated the indicia of apparent authority upon which he claimed to have relied. Those were: (1) Mr. Becker was and had been counsel for Hawaiian for many years in matters before the FCC and Mr. Becker acted as counsel in connection with the filing of Hawaiian's part of the Application with the FCC; (2) Mr. Becker had been designated as escrow agent by Hawaiian on two occasions; (3) Mr. Becker was listed as a person to be notified

in connection with official communications under the agreement; (4) Mr. Becker was dealing with something which was considered an incident of the FCC hearing; (5) Mr. Becker had, so far as Mr. Dobin knew, been authorized on two occasions on behalf of Hawaiian to modify the basic agreement; and (6) Mr. Becker told him that Mr. Becker had been communicating with Mr. Watumull about the subject matter of the agreement (Tr. 92-94). For those reasons, Mr. Dobin testified he believed that Mr. Becker had authority to make on behalf of Hawaiian the extension agreement set forth in the December 16 letter.

It is helpful to separately analyze the record as it relates to each of the claimed indicia of apparent authority.

(1) Mr. Becker was and had been counsel for Hawaiian for many years in matters before the FCC and Mr. Becker acted as counsel in connection with the filing of Hawaiian's part of the Application with the FCC.

Mere employment of an attorney confers no apparent authority upon him to settle or compromise an action or to bind his client by entering into a contract or modifying an existing contract. Particularly, the attorney-client relationship does not confer upon the attorney the authority to enter into any agreement which would surrender a substantial right of his client or impose new burdens upon the client. Nellis v. Massey, 108 Cal. App. 2d 724, 239 P. 2d 509; 7 C.J.S., Attorney and Client, §105, P. 931; Starling, Executor v. West Erie Avenue Building, 333 Pa. 124, 3A 2d 387; McKeague v.

Freitas, 40 Haw. 108; Kallen v. Pollock, 412 Pa. 281, 194 A. 2d 227; 30 A.L.R. 2d 944 (Supplementing 66 A.L.R. 108).

(2) Mr. Becker had been designated as escrow agent by Hawaiian on two occasions.

The duties of Mr. Becker as escrow agent were very specific and were expressly detailed in the escrow instructions established by the January 11, 1966 letter (Ex. P-2f) and June 7 and 8, 1966 letters (Ex. P-3 and P-4). As such escrow agent he clearly would have no authority to go beyond the escrow instructions. This Court can take notice of the fact that attorneys are many times named as escrow agents in matters relating to their client's affairs. It is neither reasonable nor prudent to believe that the appointment as an escrow agent confers upon such agent the apparent authority to enter into a substantial and material modification of a client's existing contract. Philadelphia v. Schofield, 375 Pa. 554, 101 A. 2d 625.

(3) Mr. Becker was listed as a person to be notified in connection with official communications under the agreement.

Such a designation is too insignificant to establish apparent authority in this case. It is significant to note in this connection that Mr. Becker was only one of two persons who were to be notified. The other person was Mr. Watumull (Ex. P-1, page 20; R. 31). Mr. Dobin apparently ignored that provision of the basic agreement when he failed to send a copy of the December 16 letter to Mr. Watumull.

(4) Mr. Becker was dealing with something which was considered an incident of the FCC hearing.

This alleged indicia of apparent authority is essentially similar to number (1) above and as asserted there, it does not constitute an act of the principal which would give rise to a reasonable belief that apparent authority existed to materially modify an existing contract. On the contrary, this aspect of the authority question raises a more fundamental and far-reaching issue which decisively militates against any finding of apparent authority.

Both Mr. Becker and Mr. Dobin are attorneys who specialize and have specialized for many years in FCC matters. As such, those gentlemen knew or should have known the rules and regulations of the FCC, including the rule which is set forth in 47 Code of Federal Regulations §1.513 (See Appendix A). Section 1.513 requires that: "applications, amendments thereto and related statements of fact required by the Commission shall be personally signed by the applicant,---; by an officer if the applicant is a corporation;---". Subsection b of Section 1.513 expressly requires that: "Applications, amendments thereto and related statements of fact required by the Commission may be signed by the applicant's attorney in cases of the applicant's physical disability or of his absence from the United States."

The testimony establishes that the December 16 letter was filed with the FCC as an amendment to the application (Tr. 109). Accordingly, both Mr. Dobin and Mr. Becker knew

or should have known that Section 1.513 applied and that the December 16 letter, not being signed by the principals, was or at least might have been invalid. Even if such rule would not ipso facto render the December 16 letter invalid, it is sufficient that it establishes that Mr. Dobin was not acting reasonably and prudently when he relied upon the signature of Mr. Becker on the December 16 letter because he knew or should have known that the FCC required a higher order of signature.

Mr. Dobin certainly relied on those FCC rules when he asserted that it was sufficient to serve a copy of the December 16 letter only upon Mr. Becker and he cited rule 1.47 (47 C.F.R. §1.47) in support of his position (Tr. 98-99). It can be inferred that the FCC rules were in mind when Mr. Dobin prepared the Supplement (Ex. D-2) for the signatures of the principals.

(5) Mr. Becker had, so far as Mr. Dobin knew, been authorized on two occasions on behalf of Hawaiian to modify the basic agreement.

Mr. Dobin's knowledge of the prior modifications, that is the letters of January 11, 1966 (Ex. P-2 f) and June 7 and 8, 1966 (Exs. P-3 and P-4) was second hand (Tr. 47). He admits that he was not involved in the case until after those agreements were reached and executed (Tr. 50-51); that he did not previously discuss those agreements with Mr. Becker (Tr. 107); that his knowledge of the circumstances surrounding the execution of those agreements came from the face of the agreements themselves (Tr. 108).

Besides, the circumstances surrounding those modifications of the basic agreement were substantially different from those attendant upon the negotiation and execution of the December 16 letter. First, both of those modifications were initiated by Mr. Watumull and negotiated by Mr. Becker with Mr. Watumull's express request and knowledge. Second, both of the modifications essentially ran in favor of and were for the benefit of Hawaiian.

The January 11 letter (Ex. P-2f) is completely distinguishable. Mr. Watumull specifically executed the basic agreement upon the condition that the closing date be changed (Ex. D-1). The face of the January 11 letter shows the express authority of Mr. Watumull. In any event, the January 11 letter was affixed as an exhibit to the Application at the time the Application was sent to and was signed by Mr. Watumull (Tr. 269). This latter fact also negates Friendly's contention that C.F.R. 1.513 was not honored by the parties on previous occasions.

The increase in the escrow amount established in June of 1966 was also done at the direction and with the knowledge of Mr. Watumull (Tr. 312-313). Other than the amount and bank, the terms of the agreement were merely those which had already been established by the January 11 agreement. The letter from Mr. Becker to Edwin A. Schneider, president of the Bank of Hawaii (Ex. P-12a) shows that when the account was established at the Bank of Hawaii a copy of the letter was sent to Mr. Watumull. It is thus apparent that Mr. Becker's duties

in connection with each of the escrow letters were ministerial and incidental and in any event were expressly authorized and approved. Two expressly authorized acts done by an agent are insufficient to justify an inference of apparent authority to subject the principal to liability by subsequent acts not expressly authorized. Smith Premier Typewriter Co. v. National Hartel Light Co., 72 Misc. 405, 130 N.Y.S. 136.

The second important point of difference is that in the cases of the January 11 and June modifications, the benefits ran in favor of Hawaiian. On the other hand the December 16 letter was a material modification of a basic contract which would have substantially modified and waived Hawaiian's basic rights.

(6) Mr. Becker told Mr. Dobin that he had been communicating with Mr. Watumull about the subject matter of the agreement.

There is no question but that Mr. Becker was communicating with Mr. Watumull about the subject matter of the agreement. However, considering the evidence it is unreasonable to conclude that Mr. Dobin could prudently have relied upon the fact that he knew Mr. Becker was communicating with Mr. Watumull.

In the latter part of November, Mr. Becker, Mr. Dobin and Mr. Eaton met and presumably agreed upon a modification of the basic agreement. Mr. Becker told Mr. Dobin and Mr. Eaton that he would recommend it to his client (Tr. 73). Mr. Dobin reduced at least part of the oral agreement to writing (Ex. D-2). Although the agreement, that is, the "flip of the coin" (Tr. 75) whereunder Friendly would reimburse Hawaiian up to $7,500 for

for legal fees was also made at that meeting, that matter was not mentioned in the Supplement (Ex. D-2). Mr. Dobin procured the signature of Mr. Eaton, as president of Friendly, and transmitted the Supplement to Mr. Becker so that he would forward it to Mr.Watumull (Tr. 76). Mr. Becker transmitted the agreement to Mr. Watumull (Ex. D-3). Mr. Watumull promptly rejected the Supplement, and Mr. Becker communicated the rejection to Mr. Dobin (Tr. 76-77).

Mr. Dobin said, after the November meeting, "I thought I had an agreement." (Tr. 74). He, of course, was wrong. Mr. Watumull rejected it and Mr. Dobin knew it. These circumstances should have caused Mr. Dobin to know that it was not sufficient merely to believe that an agreement he entered into with Mr. Becker would be acceptable to Mr. Watumull. It is submitted that this incident alone was sufficient to have conclusively placed Mr. Dobin on notice that he could not safely rely upon Mr. Becker and he needed the agreement of Mr. Watumull. It should have been the "danger signal" and suggested to Mr. Dobin he had the duty to proceed with caution. Standard Acc. Ins. Co. v. Simpson, 64 F. 2d 583 (4th Cir. 1933). The agreement which is embodied in the December 16 letter was made by Mr. Becker and Mr. Dobin in a single telephone conversation (Tr. 79-80; 129; 131). Certainly Mr. Dobin must have known or should have known that since he initiated the ideas as to what the terms of the new agreement would be, Mr. Becker had no way in which he could have previously discussed with or received from Mr. Watumull authorization

with respect to the new terms of that agreement. It simply is impossible to conclude or infer that Mr. Dobin could have reasonably believed that Mr. Becker had authority to enter into an agreement which was being suggested for the first time and which could not possibly have been communicated to Mr. Watumull.

Mr. Watumull had just rejected an agreement which would have extended the basic agreement to a fixed date and which would have compensated Hawaiian for at least $35,000 worth of the operating losses it suffered and would suffer since September 28, 1966. Having just rejected such an agreement, it is inconceivable to believe that Mr. Watumull would have agreed to an indefinite extension of the termination date of the basic agreement when the only consideration to be received was that Friendly would reimburse Hawaiian in a sum not to exceed $7,500 for its attorney's fees.

It is thus submitted that the evidence does not sufficiently support a holding that Mr. Becker had apparent authority to enter into the December 16 letter. After the rejection of the Supplement, there were certainly no acts of the principal upon which Mr. Dobin could rely as a basis for his believing that Mr. Becker had authority to enter into and sign an agreement materially modifying the basic agreement. As has been previously cited, it is necessary to establish apparent authority by the acts of the principal and not the acts of the agent.

It has been previously shown that Mr. Becker did not state to Mr. Dobin that he had authority and Mr. Dobin did not inquire whether Mr. Becker had authority. The risk of such failure is upon Friendly. National Bread Co. v. Bird, 226 Ala. 40, 145 So. 462:

> "All who deal with an attorney or other agent must ascertain the extent of his authority. If they do not inquire, they can claim no protection because they indulged suppositions or conjectures, reasonable or unreasonable, that the agent had the authority he was exercising."

See also, McKeague v. Freitas, supra; Starling, Executor v. West Erie Avenue Building, supra; Standard Acc. Ins. Co. v. Simpson, supra; Bank of Glade Spring v McEwen, 160 N.C. 414, 76 S.E. 222.

III. HAVING HELD THAT THE DECEMBER 16 LETTER WAS BINDING ON THE PARTIES, THE DISTRICT COURT HAD NO POWER TO IGNORE THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THAT LETTER AND TO ORDER SPECIFIC PERFORMANCE OF THE AGREEMENT AFTER IT HAD BEEN TERMINATED BY HAWAIIAN AT THE TIME EXPRESSLY PERMITTED BY THE DECEMBER 16 LETTER.

A. IF THE DECEMBER 16 LETTER WAS BINDING ON THE PARTIES, HAWAIIAN HAD A RIGHT TO TERMINATE THE AGREEMENT ACCORDING TO THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE DECEMBER 16 LETTER.

On June 30, 1967, the District Court entered Findings of Fact and Conclusions of Law (R. 112-126). On that same date the Court also entered a Judgment (R. 127-129) wherein Hawaiian was enjoined from taking certain actions specified therein, including terminating the basic agreement. The Judgment by its terms contemplated further action by the Court and the Court expressly reserved jurisdiction in the cause (R. 129).

The parties stipulated (Tr. 403-404, 406-407) that subsequent to the entry of Judgment on June 30, 1967, the following events occurred with respect to the Application with the FCC: (1) On July 27, 1967, the FCC examiner's initial decision was released and it was in favor of the transfer of the license; and (2) the decision of the FCC consenting to the transfer of the license became final on September 15, 1967.

The Court concluded, as a matter of law, that the December 16 letter was binding upon both Friendly and Hawaiian (R. 125, Conclusion of Law No. 10). Hawaiian did not, and still does not, agree with that conclusion, but it had to recognize that it was bound by such holding on September 15, 1967. Accordingly, on September 15, 1967, which was the

earliest opportunity after the FCC decision became final, Hawaiian gave notice of immediate termination of the agreement with respect to the sale and purchase of KTRG-TV (R. 150; Tr. 408). On the same day Hawaiian also orally moved the Court for an order vacating the injunction and dismissing the action (Tr. 408). The oral motion was renewed in writing (R. 144-151). The Court denied the motion (Tr. 448-449) and entered its Final Judgment of specific performance on September 19, 1967 (R. 152-156).

Hawaiian based its right to terminate on the last sentence of the second paragraph of the December 16 letter, which paragraph in its entirety states as follows:

> "In consideration of our going forward promptly and diligently with the hearing and the prosecution of the application, Hawaiian Paradise has agreed not to terminate the pending sales agreement until such time as an initial decision shall be issued by the Examiner. If that decision should recommend a denial of the application, Hawaiian Paradise would be free to give Friendly notice of cancellation of the agreement. However, if the decision is favorable, you would not terminate the agreement until a final decision is rendered by the Commission."

The language of the last sentence of the above quoted paragraph is clear and unabmiguous and the Court had no power to ignore its plain meaning and subject the language to interpretation. The cases are legion in holding that a court may not resort to construction or interpretation where the agreement of the parties is expressed in clear and unambiguous language. 17A C.J.S. Contracts, §294(b); 17 Am. Jur. 2d, Contracts, §241;

Great Lakes Towing Co. v. Bethlehem Transp. Corporation, 65 F. 2d 543 (6th Cir. 1933); Homelite v. Trywilk Realty Company, 272 F. 2d 688 (4th Cir. 1959); Ross v. Harding, 64 Wash. 2d 231, 391 P. 2d 526; Silen v. Silen, 44 Wash. 2d 884, 271 P. 2d 674; Atlas Sewing Center, Inc. v. Belk's Department Store, Fla., 162 So. 2d 274; Costiga Development Co. v. United Fuel Gas Co., 147 W.Va. 484, 128 S.E. 2d 626; Southern Construction Company, Inc., v. United States, 364 F. 2d 439 (Ct. Clms 1966); Carter Oil Co. v. McCasland, 190 F. 2d 887 (10th Cir. 1951), cert. den. 342 U.S. 870, 72 S.Ct. 113, 96 L. Ed. 654, reh. den. 342 U.S. 899, 72 S.Ct. 231, 96 L. Ed. 673; K E C O Industries, Inc. v. United States, 364 F. 2d 838 (Ct. Clms 1966), cert. den. 386 U.S. 958.

B. IF ARGUENDO, THE COURT COULD PROPERLY RESORT TO INTERPRETATION, IT REACHED THE WRONG MEANING OF THE LAST SENTENCE FOR THE FOLLOWING REASONS:

1. It Failed To Construe Any Doubtful Language Against The Draftsman.

The December 16, 1966, agreement was drafted by Mr. Dobin (Tr. 83-84), attorney for Friendly. The cases are also legion in holding that, if a contract must be interpreted because of doubtful language, the contract must be construed most strongly against the party who drew it. 17A C.J.S., Contracts, §324; 17 Am. Jur. 2d, Contracts, §276; W. T. Rawleigh Co. v. Wilkes, 197 Ark. 6, 121 S.W. 2d 886; Couture v. Ocean Park Bank, 205 Cal. 338, 270 P. 943; Kinmonth v. Griffith, 180 Kan. 389, 304 P. 2d 494; Laue v. Grand Fraternity, 132 Tenn. 235,

177 S.W. 941; Cedar Park Cemetery Ass'n. v. Calumet Park, 398 Ill. 324, 75 N.E. 2d 874; Green v. Royal Neighbors of America, 146 Kan. 571, 73 P. 2d 1.

2. Under The Guise Of Construction, It Improperly Wrote A New Contract For The Parties.

In effect, the Court rewrote the last sentence of the December 16 letter to read as follows: "However, if the decision is favorable, you would not terminate the agreement until a final decision is rendered by the Commission; provided that if the final decision is favorable you will not terminate at all and if the final decision is unfavorable, you can terminate but only upon five days' notice." (Oral Decision, (Tr. 423-431). The Court's attempted interpretation violates the fundamental principle that a court may not rewrite a contract under the guise of construction by inserting words which the parties have not used. 17 Am. Jur. 2d, Contracts, §242; Public Service Co. v. City and County of Denver, 153 Colo. 396, 387 P. 2d 33; Washington Constr. Co. v. Spinella, 8 N.J. 212, 84 A. 2d 617; McCall v. Carlson, 63 Nev. 390, 172 P. 2d 171. "It is elementary law, universally accepted, that the courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves." Chaffee v. Chaffee, 19 Wash. 2d 607, 145 P. 2d 244. "In construing a letter, a court is not at liberty in order to fasten liability to add or take away words, thereby altering the sense, and either enlarging or cramping the assurance given in the

instrument." Liggett v. Levy, 235 Mo. 590, 136 S.W. 299. "Neither a court of law nor a court of equity can interpolate in a contract what the contract does not contain, either in words or by necessary implication." 17 Am. Jur. 2d, Contracts, §242, p. 629; Gavinzel v. Crump, 89 U.S. (22 Wall.) 308, 22 L. Ed. 783; Hudson Canal Co. v. Pennsylvania Coal Co., 75 U.S. (8 Wall.) 276, 19 L. Ed. 349.

The principles which prohibit a court from rewriting the parties' contract are particularly applicable to specific performance actions. Friendly prayed for specific performance of the basic agreement, as amended by the December 16 letter (R. 61-62). The Court cannot reform or rewrite the agreement and then specifically enforce it. O'Brien v. Fricke, 148 Neb. 369, 27 N.W. 2d 403; Brody v. W. & L. Enterprises, Inc. 117 N.Y.S. 2d 719, 4 Misc. 2d 907, aff'd 120 N.Y.S. 2d 239, 281 App. Div. 867; Waterman v. Banks, 144 U.S. 394, 12 S.Ct. 646, 36 L. Ed. 479.

3. It Failed To Consider The Material Evidence In Placing A Meaning Upon The Language.

The Court apparently placed some reliance on the April 17, 1967 letter (Ex. P-10) in construing the meaning of the language of the December 16 letter (Tr. 428-429). Such reliance was clearly misplaced because it was unequivocally established that when the April 17 letter was written by Mr. Watumull, he did not know of the existence of the December 16 letter.

If the Court could look to extrinsic evidence, it should have considered the April 19, 1967 letter of Mr. Dobin (Ex. D-9).

Mr. Dobin was, of course, the draftsman of the December 16 letter and it would seem that his interpretation of the language should have considerable weight. Mr. Dobin's letter of April 19, 1967 (Ex. D-9) confirms the meaning of the December 16 letter: "...this letter is to remind you of your obligation under the agreement of December 16, 1966 not to terminate the sales agreement until an initial decision shall have been issued by the Examiner and the Commission shall have had a final opportunity to pass upon the application for assignment of license."

Mr. Dobin's construction is consistent with the testimony. At no time was there considered or mentioned an obligation to stay in the proceedings or extend a termination date beyond the FCC's final decision (Tr. 60; 64; 68; 79).

The Court failed to properly consider that the requirement of FCC consent was merely permissive. Certainly a buyer or seller is not obligated to consummate a transfer of license merely because the FCC approves such a transfer. The parties never agreed to such an obligation and the Court has no power to impose such an obligation upon them.

IV. FRIENDLY FAILED TO SUSTAIN ITS BURDEN OF PROOF ON THE QUESTION AS TO WHETHER IT WAS ENTITLED TO SPECIFIC PERFORMANCE.

The burden of proof as to whether specific performance could be granted was on Friendly. 81 C.J.S. Specific Performance, §140. In order to prevail, Friendly had to

prove the inadequacy of the ordinary remedy of law, i.e. damages. Walbergh v. Moudy, 164 Cal. App. 786, 231 P. 2d 234. The applicable presumption in Friendly's case was that, if a breach of the basic agreement, as amended, had occurred, Friendly could be adequately compensated in damages.

> "In case of contracts for the sale or transfer of personal property, on the other hand, the presumption is that a breach of the agreement can be adequately compensated for in damages. Therefore, the plaintiff must allege facts which take the case out of the ordinary rule that contracts for the sale of personalty are not specifically enforceable because of the adequacy of legal remedy. He must not only allege irreparable injury, but set up a state of circumstances which if true show that the injury would be irreparable."

49 Am. Jur., Specific Performance, §163, p. 186; see also Southern Iron & Equipment Co. v. Vaughan, 201 Ala. 356, 78 So. 212; Rimes v. Rimes, 152 Ga. 721, 111 S.E. 34.

The only showings going to the right of specific performance were that Honolulu, Hawaii, is allotted four commercial channels and one educational channel (Tr. 14). Moreover, Mr. Eaton, president of Friendly, was interested in purchasing only stations in financial trouble because this had become a challenge to him (Tr. 21). No showing was made, however, that there were no other television stations avaialble for sale which would have fulfilled Mr. Eaton's requirements. No proof was made as to the inadequacy of damages as a remedy.

CONCLUSION

There is not sufficient evidence to sustain the District Court's holding that Mr. Becker had either express or apparent authority. If Friendly relied upon Mr. Becker, it was a misplaced reliance and one which it created and which it assumed the risk of by its failure to inquire as to the authority of Mr. Becker to bind Hawaiian to the agreement embodied in the December 16 letter.

If the Court sustains the holding that the December 16 letter is binding upon the parties, the Judgment should be reversed on the grounds that the agreement was properly and timely terminated by Hawaiian's letter of September 15, 1967.

Dated: Honolulu, Hawaii; March 9, 1968.

Respectfully submitted,

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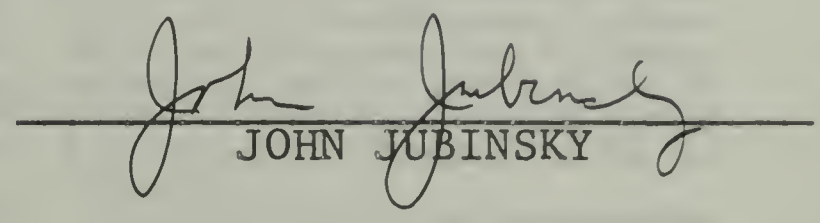
Of Counsel

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.



JOHN JUBINSKY

APPENDIX A

Title 47, Code of Federal Regulations, §1.511 and §1.513

... this chapter: *Provided*, That ... interference shall be caused to other ... maintaining a regular operating ... within the experimental pe... the licensees of such other ... have previously consented ...

... broadcast station NDEA's per... stations to operate, with their ... power and on their licensed ... in the State Defense Network ... of the State in which the FM sta... is located, to provide an alerting ... and to aid in the restoration ... normal communications facilities ... and after an emergency.

(b) Remote pickup broadcast station NDEA's permit such stations to operate in a prescribed manner, on their licensed frequency and with normal power, in the State and local remote pickup broadcast intercommunication networks for intercommunication, cue and control, and program purposes during or after an emergency.

(c) Other NDEA's which may be issued will be on such terms as may be designated therein.

(d) All NDEA's are issued for periods of time covered by the station license of the station concerned, subject, however, to being changed or canceled at an earlier date in the discretion of the Commission without the necessity of a hearing.

(g) Unless canceled, National Defense Emergency renewal authorizations will be issued together with the station's renewal license.

General Filing Requirements

§ 1.511 Applications required.

(a) Except as provided in paragraph (b) of this section, construction permits as defined in section 3(dd) of the Communications Act of 1934, as amended; station licenses as defined in section 3(bb) of the Communications Act; modifications of construction permits or licenses; renewals of licenses; transfers; and assignments of construction permits or station licenses, or any rights thereunder, shall be granted only upon written and subscribed application. A separate application shall be filed for each instrument of authorization requested, except as may otherwise be provided in this part.

(b) In cases of (1) emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged, and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, without the filing of a formal application; but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it.

(c) Each individual request submitted under the provisions of paragraph (b) of this section shall contain, as a minimum requirement, the following information:

(1) Name and address of applicant.

(2) Location of proposed installation or operation.

(3) Official call letters of any valid station authorization already held by applicant and the station location.

(4) Type of service desired (not required for renewal, nor for modification unless class of station is to be modified).

(5) Frequency assignment, authorized transmitter power(s), and authorized class(es) of emission desired (not required for renewal; required for modification only to the extent such information may be involved).

(6) Equipment to be used, specifying the manufacturer and type or model number (not required for renewal; required for modification only to the extent such information may be involved).

(7) Statements to the extent necessary for the Commission to determine whether or not the granting of the desired authorization will be in accordance with the citizenship eligibility requirements of section 310 of the Communications Act.

(8) Statement of facts which, in the opinion of the applicant, constitute an emergency to be found by the Commission for the purpose of this section, including the estimated duration of the emergency; or which, if during an emergency or war declared by the President or Congress, necessitate such action, without formal application, for the national defense or security or in furtherance of the war effort.

(Sec. 308, 48 Stat. 1084, as amended; 47 U.S.C. 308)

§ 1.512 Where to file; number of copies.

All applications for authorizations required by § 1.511 shall be filed at the Commission's main office in Washington, D.C. The number of copies required for each application is set forth in the FCC Form which is to be used in filing such application.

[29 F.R. 12371, Aug. 28, 1964]

§ 1.513 Who may sign applications.

(a) Except as provided in § 1.511(b) or in paragraph (b) of this section, applications, amendments thereto, and related statements of fact required by the Commission shall be personally signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer, if the applicant is a corporation; or by a member who is an officer, if the applicant is an unincorporated association. Applications, amendments, and related statements of fact filed on behalf of eligible government entities, such as states and territories of the United States and political subdivisions thereof, the District of Columbia, and units of local government, including incorporated municipalities, shall be signed by such duly elected or appointed officials as may be competent to do so under the laws of the applicable jurisdiction.

(b) Applications, amendments thereto, and related statements of fact required by the Commission may be signed by the applicant's attorney in case of the applicant's physical disability or of his absence from the United States. The attorney shall in that event separately set forth the reason why the application is not signed by the applicant. In addition, if any matter is stated on the basis of the attorney's belief only (rather than his knowledge), he shall separately set forth his reasons for believing that such statements are true.

(c) Only the original of applications, amendments, or related statements of fact need be signed; copies may be conformed.

(d) Applications, amendments, and related statements of fact need not be submitted under oath. Willful false statements made therein, however, are punishable by fine and imprisonment, U.S. Code, Title 18, section 1001, and by appropriate administrative sanctions, including revocation of station license pursuant to section 312(a)(1) of the Communications Act of 1934, as amended.

(Sec. 308, 48 Stat. 1084, as amended; 47 U.S.C. 308)

§ 1.514 Content of applications.

(a) Each application shall include all information called for by the particular form on which the application is required to be filed, unless the information called for is inapplicable, in which case this fact shall be indicated.

(b) The Commission may require an applicant to submit such documents and written statements of fact as in its judgment may be necessary. The Commission may also, upon its own motion or upon motion of any party to a proceeding, order the applicant to amend his application so as to make the same more definite and certain.

(Sec. 308, 48 Stat. 1084, as amended; 47 U.S.C. 308)

§ 1.516 Specification of facilities.

(a) An application for facilities in the standard, FM, or television broadcast services shall be limited to one frequency, or channel assignment, and no application will be accepted for filing if it requests alternate frequency or channel assignments.

(b) An application for facilities in the experimental and auxiliary broadcast services may request the assignment of more than one frequency if consistent with applicable rules in Part 74 of this chapter. Such applications must specify the frequency or frequencies requested and may not request alternate frequencies.

(c) An application for construction permit for a new broadcast station, the facilities for which are specified in an outstanding construction permit, will not be accepted for filing.

(d) An application for facilities in the international broadcast service may be filed without a request for specific frequency, as the Commission will assign frequencies from time to time in accordance with §§ 73.702 and 73.711 of this chapter.

(Sec. 308, 48 Stat. 1084; as amended; 47 U.S.C. 308)

§ 1.518 Inconsistent or conflicting applications.

While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by the same applicant, his successor or as-

APPENDIX B

TABLE OF EXHIBIT REFERENCES

Plaintiff's Exhibit	Identified	Offered	Received
P-1	Pre-Trial Conference (May 31, 1967)		
P-2a	"	"	"
P-2b	"	"	"
P-2c	"	"	"
P-2d	"	"	"
P-2e	"	"	"
P-2f	"	"	"
P-2g	"	"	"
P-3	"	"	"
P-4	"	"	"
P-5	"	"	"
P-6	"	"	"
P-7	"	"	"
P-8	"	"	"
P-9	"	"	"
P-10	"	"	"
P-11a	"	"	"
P-11b	"	"	"
P-11c	"	"	"
P-11d	"	"	"
P-11e	"	"	"
P-11f	"	"	"
P-12	Tr. 228	Tr. 229	Tr. 230
P-12a	Pre-Trial Conference (May 31, 1967)		
P-13	Tr. 84	Tr. 84	Tr. 85

Defendant's Exhibit	Identified	Offered	Received
D-1	Pre-Trial Conference (May 31, 1967)		
D-2	"	"	"
D-3	"	"	"
D-4	"	"	"
D-5	May 31, 1967	Tr. 261	Tr. 261
D-6	May 31, 1967	Tr. 261	Tr. 261
D-7	Pre-Trial Conference (May 31, 1967)		
D-8a	"	"	"
D-8b	"	"	"
D-8c	"	"	"
D-8d	"	"	"
D-8e	"	"	"
D-8f	"	"	"
D-9	"	"	"